



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 9, 2004

Mr. Forrest K. Phifer
P.O. Box 829
Rusk, Texas 75785

OR2004-9547

Dear Mr. Phifer:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 212583.

The City of Rusk Police Department (the "department"), which you represent, received a request for information (1) related to the arrest and death of a named individual, including arrests on June 22, 2002 and June 3, 2003, as well as a suicide investigation on or about June 3, 2003; (2) "any and all dates of incarceration" of the named individual; and (3) "any incarceration dates that the Cherokee County Sheriff's Department [the "sheriff"] may have with respect to" a second named individual. You state that the department does not have any records of the sheriff.¹ You indicate that some responsive information has been released to the requestor. You claim that the submitted information is excepted from disclosure under section 552.108 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Initially, we note that you did not submit information responsive to the request for records related to a suicide investigation on or about June 3, 2003. We assume the department has released this information to the requestor. If it has not, it must do so at this time to the extent that such information exists. See Gov't Code §§ 552.301(a), .302. We caution, however, that

¹Chapter 552 of the Government Code does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. See *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App. – San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

section 552.352 of the Act imposes criminal penalties for the release of confidential information

We next note that you have indicated that the department has asked the requestor to clarify or narrow portions of the request. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information). You do not inform us whether the department had received a response to its letter as of the date you requested this ruling. Because the department is apparently awaiting a response to its request for clarification, its deadline for seeking a ruling from this office as to information responsive to these portions of the request has been tolled. *See* Open Records Decision No. 663 (1999) (determining that during interval in which governmental body and requestor communicate in good faith to narrow or clarify request, the Act permits tolling of deadlines imposed by section 552.301). We note, however, that "the ten-day deadline is tolled during the [clarification or narrowing] process but resumes, upon receipt of the clarification or narrowing response, on the day that the clarification is received." ORD 663 at 5. Thus, the department's deadlines for requesting a ruling from this office with respect to information responsive to those portions of the request will resume on the department's receipt of the requestor's response.

We understand you to assert that the submitted information is excepted under section 552.108 of the Government Code as interpreted by *Holmes v. Morales*. *See Holmes v. Morales*, 924 S.W.2d 920 (Tex. 1996). In *Holmes*, the Texas Supreme Court held that the plain language of section 552.108 did not require a governmental body to show that release of the information would unduly interfere with law enforcement. *Id.* at 925. Subsequent to the interpretation of section 552.108 in *Holmes*, the Seventy-fifth Legislature amended section 552.108 extensively. *See* Act of June 1, 1997, 75th Leg., R.S., ch. 1231, § 1, 1997 Tex. Gen. Laws 4697. As amended, section 552.108 now expressly requires a governmental body to explain, among other things, how release of the information would interfere with law enforcement. Section 552.108 now reads as follows:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if:

- (1) release of the information would interfere with the detection, investigation, or prosecution of crime;
- (2) it is information that the deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication;

(3) it is information relating to a threat against a peace officer collected or disseminated under Section 411.048; or

(4) it is information that:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) reflects the mental impressions or legal reasoning of an attorney representing the state.

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from [required public disclosure] if:

(1) release of the internal record or notation would interfere with law enforcement or prosecution;

(2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication; or

(3) the internal record or notation:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) reflects the mental impressions or legal reasoning of an attorney representing the state.

(c) This section does not except [from public disclosure] information that is basic information about an arrested person, an arrest, or a crime.

Gov't Code § 552.108. Generally, a governmental body claiming subsection 552.108(a)(1) or 552.108(b)(1) must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See* Gov't Code §§ 552.108(a)(1), (b)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You have not stated that the submitted information pertains to an ongoing criminal investigation or prosecution, nor have you explained how its release would interfere in some way with the detection, investigation, or prosecution of crime. Thus, you have not met your burden under subsection 552.108(a)(1) or 552.108(b)(1). A governmental body claiming subsection 552.108(a)(2)

or 552.108(b)(2) must demonstrate that the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. It is not clear to this office, nor have you explained, how or if the investigation at issue has actually concluded. Thus, you have not met your burden under subsection 552.108(a)(2) or 552.108(b)(2). Section 552.108(a)(3) is also inapplicable as the remaining submitted information does not relate to a threat against a police officer. *See Gov't Code* § 552.108(a)(3). Lastly, you do not assert that the information at issue was prepared by an attorney representing the state or that it reflects the mental impressions or legal reasoning of an attorney representing the state. *See Gov't Code* § 552.108(a)(4), (b)(3). Therefore, you may not withhold any of the submitted information under section 552.108.

The information at issue contains social security numbers, which may be withheld in some circumstances under section 552.101 of the Government Code.² A social security number or "related record" may be excepted from disclosure under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See Open Records Decision No. 622 (1994)*. These amendments make confidential social security numbers and related records that are obtained or maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that any of the social security numbers in the file are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. However, we note that this federal provision is intended to protect the privacy interests of individuals; therefore, this provision does not encompass the social security number of a deceased individual. *See Attorney General Opinion H-917 at 3-4 (1976)*; *Open Records Decision No. 272 at 1 (1981)*. We also caution that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained by the department pursuant to any provision of law enacted on or after October 1, 1990.

Finally, we note that the submitted documents include motor vehicle record information. Section 552.130 of the Government Code requires the department to withhold information that "relates to . . . a motor vehicle title or registration issued by an agency of this state." We note, however, that section 552.130 is designed to protect individuals' privacy and that the right to privacy expires at death. *See Moore v. Charles B. Pierce Film Enters., Inc.*, 589 S.W.2d 489, 491 (Tex. App.—Texarkana 1979, writ ref'd n.r.e.); *see also Justice v. Belo Broadcasting Corp.*, 472 F. Supp. 145, 146-47 (N.D. Tex. 1979); *Attorney General Opinion H-917 at 3-4 (1976)*; *Open Records Decision No. 272 at 1 (1981)*. Accordingly, pursuant to section 552.130, the department must withhold the Texas driver's license number that we have marked, as well as the Texas-issued license plates and vehicle identification numbers

²Section 552.101 of the Government Code excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."

of vehicles in which living individuals have an interest. Information from motor vehicle records that were issued to persons who are now deceased may not be withheld under section 552.130.

In summary, the social security number of a living individual may be confidential under federal law. Pursuant to section 552.130, the department must withhold the Texas driver's license number that we have marked, as well as the Texas-issued license plates and vehicle identification numbers of vehicles in which living individuals have an interest. The remaining submitted information must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

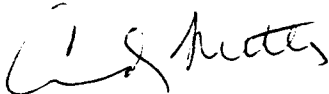
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877)673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512)475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/jh

Ref: ID# 212583
Enc. Submitted documents

c: Ms. Nancy Piette
3207 Cimmaron
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(w/o enclosures)